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LEO M. FRANK LOSES LAST FIGHT IN
STATESUPREME COURT

**TO
APPEAL
TO THE
U.S.
SUPREM**

E COURT

Court Holds That Point
Made

in Motion, That Verdict
Was

Rendered in
Defendant's Ab-
sence, Should Have
Been

Raised When New Trial
Was

Asked

The Supreme Court of Georgia Saturday afternoon handed down a decision affirming the decision of Judge Benjamin H. Hill in refusing to grant the motion to set aside the verdict in the case of Leo M. Frank on the ground that Frank was not in Court when the verdict was read.

All justices, except Chief Justice Fish, who is ill, concurred in the opinion.

The opinion was written by Associate Warner Hill.

The Court in its opinion holds that the points made by Frank in his motion to set aside could and should have been made in his preceding motion for a new trial. The Court quoted a number of authorities in this connection, after which it said:

"It will be seen that where a motion for a new trial is made, that the defendant must in his motion for a new trial set out all that is known to him at the time or by reasonable diligence could have been known by him, as grounds for a new trial."

"Did the defendant in the instant Case know at the time he made his motion that he was absent without his consent when the verdict of guilty was rendered against him?"

"He must have necessity have known if, and likewise his counsel. In the ground of his motion for a new trial (which was reviewed and passed on by this Court in the Case of Frank vs. the State, 141, Georgia, 243), it was alleged:"

"Defendant was not in the Courtroom when the verdict was rendered, his presence having been waived by his counsel."

"When one convicted of crime makes a motion for a new trial, it is his duty to include everything in it which was appropriate to such a motion, and which was known to him at the time. As we have seen, defendant could have made the question under consideration in the motion for a new trial."

PRECEDENT IS CITED.

The Court, in substantiation of the principle above laid down, cites the case of Daniels vs. Towers, 779 Ga., 785. Former Justice Bleckley delivered this opinion, which in part was as follows:

"We rest the case upon the general rule that, after a judge of the superior Court has presided in any case in the superior Court

of any county, and the judgment rendered at the trial has been affirmed by this (the Supreme) Court, it is to be taken for all purposes that it was a legal trial and judgement, and cannot be questioned for anything but the want of jurisdiction appearing upon the face of the proceedings as ruled upon here. If there is more record below, and the plaintiff in error after conviction does not bring it up, it is his own misfortune. He had an opportunity to bring it up. He must abide the judgment upon the record which he brings here; and if the judgement is legal according to that record, he must take the consequences. It will not do to allow him to bring up his case in sections, whether there is a trial of it by Court provided in sections or not he must bring up his whole case as he expects to stand upon it for all time; and if he does not do it, neither he nor his friends can repair the error afterwards.

MAY WAIVE RIGHT.

Referring to Frank's contention that he had a right to be present when the verdict was rendered and could not waive such right, the Court says:

"It is the undoubted right of a defendant who is indicted for a criminal offense in this State to be present at every stage of his trial. But he may waive his presence at the reception of the verdict entered in his case."

Authorities to sustain this point are cited by the Court.

Touching upon the authority of Frank's counsel to waive his presence for him, the Court says:

"As said by this Court, in effect, in the case of Lumpkin vs. the State, 87 Ga., 517, it is not sound practice for counsel to make a waiver of their clients presence at the reception of the verdict, take the chances of acquittal for their client, and then after verdict of guilty, the defendant should be allowed to repudiate the action of counsel, and employ other counsel to set aside the verdict because of the absence of the defendant at the time it was rendered."

"Who was better prepared to protect the interests of the defendant, trained and expert counsel, or the defendant himself? True, he had the right to conduct the trial in person, if he so desired, but the defendant had committed his case to the able and experienced counsel, who in the exercise of their

relation as attorneys for the client waive his right to be present, and having made the waiver, and defendant by his conduct having acquiesced in it, he should be bound by it.”

Continuing, the Court’s opinion says:

“It would be trifling with the Court to allow one who has been convicted of crime, and who had made a motion for a new trial on over 100 grounds, including the statement that his counsel had waived his presence at the recep-

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LEO FRANK LOSES LAST APPEAL IN SUPREME COURT

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tion of the verdict, and have the motion heard both the superior and Supreme Courts, and after a denial by both Courts of the motion, to now come in and by way of a motion to set aside the verdict, include matter which were, or ought to have been, included in the motion for a new trial.”

A significant paragraph in the decision follows:

“We know of no provision in the constitution of the United States, or of this State, nor of any statute, which gives to an accused person a right to disregard the rules of procedure in a State, which affords him due process of law, and demand that he shall move in his own way and be granted absolute freedom because of an irregularity (if there is one) in receiving the verdict. If an accused person could make some of his points of attack on the verdict, and reserve other points known to him,

which he could then have made, to be used as grounds for further attacks on the verdict, there would be practically no end to a criminal case.

POINTS ALREADY CONSIDERED.

Referring to that part of the motion to set aside the verdict on the grounds of disorder in the Court room during the trial, of cheering and applause outside the Court room, and of the oral remarks of the trial judge before signing the order denying the new trial, the decision holds that these questions were raised and adjudicated in the motion for a new trial, and therefore the Court will not again consider them when sought to be raised in the motion to set aside the verdict.

APPEAL TO U.S. COURT.

When asked the course of action now to be resorted to, John L. Tye, of Tye, Peeples & Jordan, attorneys for Leo M. Frank in the motion to set aside the verdict, said that a writ of error would be filed with the State Supreme Court as soon as possible.

This cannot be filed before ten days elapse, he said, as it takes that long for the remittitur to come from the State Supreme Court to the superior Court, affirming Judge Ben H. Hill's action in denying the motion.

When the writ of error is filed, it must be certified by the State Supreme Court before the case can be carried to the United States Supreme Court. It is an open question as to whether or not the State Supreme Court will certify this writ. If the Court refuses, the next resource of the defense will be, it is said, to swear out a writ of habeas corpus in the United States District Court, and, on this writ, take the case to the Supreme Court in Washington.

Mr. Tye said the case would be carried to the United States Supreme Court on the same grounds on which the motion was asked to be set aside in the highest State Court—that Leo M. Frank was not tried according to due process of law, granted him as a constitutional right, in that he was not present when the verdict of “guilty” was returned against him, and for other minor reasons.

FRANK HEARS NEWS.

Leo M. Frank received the news that his latest appeal had been refused by the Supreme Court with the same calmness,

which has characterized him on the occasions of his many other disappointments by the Court.

“Well, I had expected the Court to be with me this time,” he said, when a Journal reporter brought the news of the fate of his appeal to him in his tower cell.

Frank had nothing else to say. Milton Klein, a friend, who was with the prisoner, said: “The United States Supreme Court is next on the list.”

Frank was writing a letter, when the news was told to him: He was not sufficiently disturbed to stop his work, and in a few minutes completed the letter and gave it to his friend to be mailed.

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BROYLES AND WADE TAKE

OATH OF OFFICE TODAY

New Members of
Court of
Appeals Sworn in by
Gov-

ernor Slaton

Judge Nash R. Broyles, of Atlanta, and Judge Peyton Wade, of Dublin, were sworn at noon, Saturday, as members of the State Court of appeal. Governor Slaton administered the oath in the Executive Offices and the Justices of the State Supreme Court and Judge R. B. Russell, chief judge of the appellate Court, were present.

Judge Broyles succeeds Judge L. S. Roan, who has been filling the unexpired term of Judge Ben H. Hill, resigned. He has four years of this term to serve. Judge Wade succeeds himself, having been appointed several months ago to succeed Judge J. R. Pottle, resigned. Judge Wade's term has two more years to run.

Judge Russell, who was also elected in the recent election for a full six-year term, will not be sworn in until January, when his present term expires. The same is true of Associate Justices of the Supreme Court, Beverly D. Evans and H. Warner Hill.
